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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

YONG T. LEE,

Plaintiff and Appellant,

v.

FRANCISCAN CLINICS,

Defendant and Respondent.

B165728

(Los Angeles County
Super. Ct. No. BS078285)

APPEAL from an order of the Superior Court of Los Angeles County,
William F. Highberger, Judge. Affirmed.

Manatt, Phelps & Phillips and Douglas W. Beck; Riley & Reiner, Ira Reiner
and Raymond L. Riley for Plaintiff and Appellant.

Gibson, Dunn & Crutcher, James P. Fogelman and Elizabeth A. Klein for
Defendant and Respondent.

A landlord and tenant agreed to arbitrate their disputes about rental increases, agreed to the manner in which the arbitrators would be appointed, and agreed to the approach that would be taken if either side failed to timely designate an arbitrator. Based on the parties' agreement, the trial court denied the landlord's petition to compel arbitration, and the landlord appeals from that order. We affirm.

FACTS

A.

Yong T. Lee, M.D., the owner of a medical office building in Los Angeles, leases the ground floor of the building to Franciscan Clinics. The lease was for an initial term of three years, July 1996 to July 1999, which was extended for three years to June 30, 2002, with three options for successive five-year terms beginning July 1, 2002. The lease provides for rental increases at the time each option is exercised, with the parties to agree on the amount or, absent agreement, "to use the 'Baseball' type arbitration" to determine the rent according to the following procedure:

"The parties shall determine the fair market value by using their best good faith judgment. Each party shall give written notice of their determination of fair market value of the rental [and] in no event shall this notice be given less than fifteen . . . days before the end of the particular term. Each party shall have fifteen . . . days after receipt of the notice of fair market value of rental to accept or to reasonably object to it in writing. In the event that either or both of the parties object to the other's fair market value of rental, the parties will make their best good faith efforts to agree. *If the parties fail to agree within a fifteen . . . day period ('Outside Agreement*

Date'), the parties shall submit to arbitration [as described in the following paragraphs].

"All notices shall be given in writing [and deemed given, made and delivered when personally served or two days after being mailed], and either party may revise its notice of fair market value of rental at any time before the third arbitrator is appointed as provided hereafter.

"(a) [Lee] and Franciscan [Clinics] shall each appoint one arbitrator who shall be by profession an MAI appraiser. The determination of the arbitrators shall be limited solely to the issue of whether [Lee's] or Franciscan [Clinics'] submitted fair market value of rental for the premises is the closest to the actual fair market value Each such arbitrator shall be appointed within fifteen . . . days after the Outside Agreement Date.

"(b) The two arbitrators so appointed shall within fifteen . . . days of the date of the appointment of the last-appointed arbitrator agree upon and appoint a third arbitrator [similarly qualified].

"(c) The three arbitrators shall within thirty . . . days of the appointment of the third arbitrator reach a decision as to whether the parties shall use [Lee's] or Franciscan[Clinics'] submitted fair market value and shall notify [the parties] thereof.

"(d) The decision of the majority of the three arbitrators shall be binding

"(e) If either [Lee] or Franciscan [Clinics] shall fail to appoint an arbitrator within fifteen . . . days after the Outside Agreement Date, the arbitrator appointed by one of them shall reach a decision notifying [the parties] thereof, and such arbitrator's decision shall be binding" (Italics added.)

B.

On February 11, 2002, Franciscan Clinics' President, Terry A. Bonecutter, notified Lee that he was exercising the first five-year option and included a proposed rental increase. On February 28, Lee objected to Franciscan Clinics' proposed rent and made his own proposal.

On March 5, Bonecutter objected to Lee's proposal and stated that he had "calculate[d] the 'Outside Agreement Date' to be March 17, 2002, [15] days from the date of [Lee's February 28] letter, plus 48 hours" (because notice was given by mail). Bonecutter asked Lee to "immediately advise" him in writing if he disagreed with the March 17 date, and stated that Franciscan Clinics would otherwise "proceed on the basis that it is March 17, 2002." The March 17 date meant that each party had to appoint an arbitrator by April 1 (and Lee never said he disagreed with the March 17 date). Bonecutter also asked Lee to call so they could "make [their] best good faith efforts to agree" on the rent as required by the lease. On March 6, Bonecutter again wrote to Lee, listing four comparables supporting the Franciscan Clinics' proposal. Lee and Bonecutter met twice but their negotiations did not result in an agreement.

On March 27, Bonecutter notified Lee of Franciscan Clinics' choice of an appointed arbitrator (Paul Reilly), but Lee did not notify Bonecutter of his choice (Deborah Smith) until April 4. Reilly thereafter notified the parties that (in his view) Franciscan Clinics' proposal (\$8,400 per month) was "the closest [to] the actual fair market rental value for the premises." Smith notified Lee that (in her view) the fair market value was \$13,842 per month.

On April 26, Lee's arbitrator wrote to Reilly about the selection of a third arbitrator, and stated in her letter that "[w]hen I finally reached you this morning you indicated that I should speak to Terry Bonecutter . . . and that you were specifically instructed not to discuss anything with me, and that you had no comment on my selection of a third appraiser." According to Lee, he later had "a number of additional communications with Franciscan Clinics" in which he attempted to persuade Bonecutter to participate in the arbitration or agree to a reasonable rental rate, and offered to "let Franciscan Clinics terminate the lease and move out of the premises if the rent determined by the arbitration [was] unsatisfactory to it."

On May 20, Bonecutter wrote to Lee, stating that Franciscan Clinics had "engaged in the procedure called for under the terms of [the arbitration provision] to establish the new rental rate. The new rental rate starting July 1, 2002, is \$8,400.00 per month. So far as [Franciscan Clinics is] concerned the matter has been resolved and there is nothing to litigate or arbitrate." On the first of each month since July 1, 2002, Franciscan Clinics has tendered to Lee a check in the amount of \$8,400.

C.

In August 2002, Lee's lawyer (Douglas W. Beck) wrote to Bonecutter, accusing him of leading Lee to believe that he was participating in good faith efforts to agree when in fact Bonecutter was "merely stalling until [he] could contend that the time within which . . . Lee was to appoint his arbitrator had expired." In fact, said Beck, the "Outside Agreement Date" was March 22, not March 17 -- 15 days, "plus the two day grace period for mailing, after [Franciscan Clinics'] notice of rejection of . . . Lee's position [Lee] appointed

his arbitrator on April 4, . . . within [15] days after the Outside Agreement Date, which [was] timely under the lease." Beck said Reilly's decision was "void," and he asked Bonecutter to participate in an arbitration -- or face a petition to compel arbitration.

Franciscan Clinics stood firm, and Lee filed a petition to compel arbitration, contending the lease was ambiguous about the manner in which the Outside Agreement Date would be determined, and that the Franciscan Clinics' interpretation was unreasonable. In a supporting declaration, Lee detailed his efforts between March 8 and the end of the month and said it was his "understanding" that, pending Bonecutter's further review of the amounts, "the lease deadlines were on hold." Lee conceded that Bonecutter never mentioned the deadlines, but Lee nevertheless said he "believed that [the] 'Outside Agreement Date' had . . . occurred [on March 29, the date of the parties' second meeting,] and that [the] 15 days to appoint an arbitrator started running then." Lee claimed that Bonecutter had not "warn[ed]" him that he had a different view.

Franciscan Clinics opposed the petition, explaining that it had fully complied with the terms of the arbitration provision, and that the "arbitration agreed to by the parties [was] already complete." In his supporting declaration, Bonecutter said he never intended to have his efforts at an informal resolution waive Franciscan Clinics' rights under the lease, and that Lee never (in writing or during their conversations or at their meetings) expressed disagreement with Bonecutter's written view that March 17 was the critical date.

The trial court denied the petition, finding the lease was unambiguous and that it plainly provided that the "Outside Agreement Date" would occur 15

"days after written notice of 'either' party of a rejection of the other party's proposed fair market value determination," that the Outside Agreement Date was March 17, that Franciscan Clinics had timely appointed an arbitrator, that Lee had not, and that Reilly's decision was binding on the parties. Lee appeals from that order.

DISCUSSION

Lee contends that "[w]here both parties have given notice of rejection, the deadline for appointing appraisers is measured from the second notice." He is wrong.

The arbitration agreement states that "[e]ach party shall give written notice of their determination of fair market value of the rental [and in] the event that either or both of the parties object to the other's fair market value of rental, the parties will make their best good faith efforts to agree. If the parties fail to agree within a [15] day period ('Outside Agreement Date'), the parties shall submit to arbitration." There is nothing ambiguous about this language and the only reasonable interpretation is the one given to it by the trial court -- that the "Outside Agreement Date" is 15 days after the first rejection (because the arbitration is triggered by "either" party's objection). (Civ. Code, § 1641; *U.S. Leasing Corp. v. DuPont* (1968) 69 Cal.2d 275, 284.)

We reject Lee's contention that this result is inequitable and tantamount to a forfeiture. He agreed to the terms set out in the arbitration agreement, which were fair to both sides because they required a prompt resolution of a disagreement that could not be resolved by good faith negotiations. There is

nothing in this record to suggest that Bonecutter acted in bad faith, or that he attempted to trick Lee. To the contrary, Bonecutter told Lee on March 5 that, in his view, the "Outside Agreement Date" was March 17, and he specifically asked Lee to let him know if he disagreed, which Lee did not do.¹ The trial court's decision was correct. (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 318-321).

DISPOSITION

The order is affirmed. Franciscan Clinics is awarded its costs of appeal.

NOT TO BE PUBLISHED.

VOGEL (MIRIAM A.), J.

I concur:

¹ While we agree with Lee that Bonecutter's March 5 letter did not unilaterally create a binding agreement about the March 17 date (*Leslie v. Brown Bros., Inc.* (1929) 208 Cal. 606, 621), we do not agree that the letter should be ignored in evaluating Lee's suggestion that he was sandbagged.

ORTEGA, Acting P.J.

MALLANO, J., Dissenting.

The trial court erred in denying Lee's petition to compel arbitration. Lee did not act tardily in appointing an arbitrator and was entitled to an arbitration by a "neutral" arbitrator selected by both sides, not just the arbitrator picked by Franciscan Clinics.

Under the terms of the lease, Franciscan Clinics had to exercise its option to extend the lease at least 90 days before the end of its term on June 30, 2002. It did so on February 11, 2002.

The "Baseball" Arbitration Provision provides that "[e]ach party shall give written notice of their [*sic*] determination of fair market value of the rental [and] in no event shall this notice be given less than fifteen . . . days before the end of the . . . term." Although Franciscan Clinics could have waited to do so, it gave notice of fair market value of rental in the same document in which it exercised its option.

The arbitration provision also states that "[e]ach party shall have fifteen . . . days after receipt of the notice of fair market value of rental to accept or to reasonably object to it in writing." Lee, in receipt of Franciscan Clinics's notice of fair market value of rental, timely objected on February 28, 2002. Although Lee could have waited to give its notice of fair market value of rental, it did so in the same document in which it made its objection.

Franciscan Clinics, in receipt of Lee's rental figure, as noted, had 15 days to object and did so on March 5, 2002.

The lease further states that "[i]n the event that either or *both* of the parties object to the other's fair market value of rental, the parties will make their best good faith efforts to agree. If the parties fail to agree within a fifteen . . . day period ('Outside Agreement Date'), the parties shall submit to arbitration [¶] . . . [¶] [Lee] and Franciscan [Clinics] shall each appoint one arbitrator . . . within fifteen . . . days after the Outside Agreement Date." (Italics added.) Here, *both* parties objected to the other's number as contemplated by the arbitration provision and, accordingly, this 15-day period ran from

March 5, 2002, the date of the second objection. Then the parties had another 15 days to appoint an arbitrator. Allowing two days for mailing, Lee's appointment of an arbitrator on April 4, 2002, was timely. Had Franciscan Clinics not objected and remained silent on March 5, 2002, then the "either party" language would result in the 15-day period running on February 28, 2002, making Lee's appointment untimely.

The arbitration provision states that "either party may revise its notice of fair market value of rental at any time before the third arbitrator is appointed" It follows that the parties contemplated that negotiations would continue between them as the arbitration process moved apace as it did here.

That both parties chose to combine documents — Franciscan Clinics's option and notice of fair market value of rental and Lee's objection and notice of fair market value of rental — has no effect on the terms of the arbitration provision. The quoted language provides that each party shall give written notice of its determination of fair market value and each party shall have 15 days after receipt of the notice to accept or object. Thus, where *both* parties object to the other's notice, the 15 days runs from the second objection under the language of the arbitration provision. Otherwise, the term "either party" is surplusage.

I cannot see how this interpretation of the arbitration provision would lead to a never-ending circle of notices as suggested by Franciscan Clinics's counsel at oral argument. I would reverse.

MALLANO, J.